

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 05-0411
GROSS RETAIL TAX
For the Years 1999, 2000, 2001, and 2002`

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Environmental Quality Control Equipment – Gross Retail Tax.

Authority: IC §6-2.5-1-1 et seq.; IC § 6-8.1-5-1(b); 45 IAC 2.2-5-70; 45 IAC 2.2-5-70(a).

Taxpayer argues that certain items of equipment are not subject to the state gross retail (Sales/Use) tax because the items were purchased for the purpose of complying with state, local, or federal environmental quality standards.

II. Safety Equipment – Sales/Use Tax.

Authority: 45 IAC 2.2-5-8(c); 45 IAC 2.2-5-8(c)(2); 45 IAC 2.2-5-8(c)(2)(F).

Taxpayer maintains that certain items are not subject to the state gross retail tax because the items are exempt "safety clothing or equipment."

III. Production Equipment – Sales/Use Tax.

Authority: IC § 6-2.5-5-3(b).

Taxpayer argues that certain items it purchased are directly used in the direct production of its manufactured products.

IV. Adjustments – Sales/Use Tax.

Authority: IC § 6-8.1-5-1(b).

Taxpayer seeks an adjustment in the assessed tax based on straight-forward computational corrections and/or because taxpayer was able to provide additional information unavailable during the original audit review.

V. Transporting Work-in-Process – Sales/Use Tax.

Authority: 45 IAC 2.2-5-8(f)(3).

Taxpayer states that certain items are exempt from the Sales/Use Tax because the items are used to transport “work-in-process.”

VI. Lump-Sum Contracts – Sales/Use Tax.

Authority: 45 IAC 2.2-3-9(e).

Taxpayer protests the imposition of Sales/Use Tax on lump sum improvements to realty.

VII. Temporary Storage Exemption – Sales/Use Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-2.5-3-2(e); IC § 6-2.5-3-4; Indianapolis Fruit Co. v. Dept. of State Rev., 691 N.E.2d 1379 (Ind. Tax. Ct. 1998); Miles v. Indiana Dept. of State Rev., 659 N.E.2d 1158 (Ind. Tax Ct. 1995); 45 IAC 2.2-3-20.

Taxpayer argues that it is entitled to an exemption from Use Tax on promotional materials temporarily stored in Indiana.

VIII. Music Collections Sold to Dealers – Sales/Use Tax.

Authority: IC § 6-2.5-5-8; IC § 6-2.5-3-2(a); 45 IAC 2.2-4-2.

Taxpayer maintains that music folios – collections of printed music – were not subject to Sales/Use Tax.

IX. Gift Items Purchased from Out-of-State Vendors – Sales/Use Tax.

Authority: 45 IAC 2.2-3-4; 45 IAC 2.2-1-1(c).

Taxpayer argues that purchases of gifts from an out-of-state vendor and shipped thereafter to out-of-state gift recipients are not subject to Sales or Use Tax.

X. Labels and Packaging Materials – Sales/Use Tax.

Authority: 45 IAC 2.2-5-15; 45 IAC 2.2-5-16; 45 IAC 2.2-5-16(a).

Taxpayer maintains that labels, packaging, and other printed materials are not subject to Sales or Use Tax.

XI. Testing and Inspection Equipment – Sales/Use Tax.

Authority: 45 IAC 2.2-5-9(i).

Taxpayer states that certain items of equipment are exempt from both Sales and Use Tax because they fall within the “testing and inspection” exemption.

XII. Catalog Information – Sales/Use Tax.

Authority: 45 IAC 2.2-4-2(a).

Taxpayer argues that the purchase of catalog information recorded on compact discs is not subject to Sales or Use Tax.

XIII. Supermarket Purchases – Sales/Use Tax.

Authority: IC § 6-8.1-5-1(b); 45 IAC 2.2-5-38.

Taxpayer maintains that purchases it made from a supermarket are not subject to Sales or Use Tax.

XIV. Magazine Subscription/Dues – Sales/Use Tax.

Authority: 45 IAC 2.2-5-26(a).

Taxpayer states amounts paid for magazine subscriptions were not subject to Sales or Use Tax because the amounts represent the cost of “dues” to a professional organization.

XV. Ten-Percent Negligence Penalty.

Authority: IC § 6-3-6-10(a); IC § 6-8.1-10-2.1(3); IC § 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

Taxpayer argues that the Department should abate the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana manufacturing business which conducts business in multiple states. The Indiana Department of Revenue (Department) conducted an audit review of taxpayer’s

records. Taxpayer disagreed with certain conclusions and submitted a protest. The matter was assigned to a hearing officer, an administrative hearing was conducted during which taxpayer's representative explained the basis for its protest, and this Letter of Findings results.

DISCUSSION

I. Environmental Quality Control Equipment – Gross Retail Tax.

Indiana imposes a sales tax on retail transactions and a complimentary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. The Indiana Administrative Code allows manufacturers an exemption for items which are purchased for the purpose of complying with environmental quality standards. 45 IAC 2.2-5-70. Specifically, the regulation provides as follows:

The state Gross Retail Tax does not apply to sales of tangible personal property which constitutes, is incorporated into, or is consumed in the operation of, a device, facility, or structure predominantly used and acquired for the purpose of complying with any state, local or federal environmental quality statutes, regulations or standards; and the person acquiring the property is engaged in the business of manufacturing, processing, refining, mining, or agriculture. 45 IAC 2.2-5-70(a).

Taxpayer has the burden of demonstrating the Department's assessment is incorrect. IC § 6-8.1-5-1(b). Taxpayer has met its burden in regards to the following items and as designated within the audit report.

Dust Collector; Asset 21094.
Buffing Hood; Asset 21195.
Industrial Safety and Environmental Services; Asset 21660, page 14.

Taxpayer has not met its burden of demonstrating that the following items are exempt from sales tax pursuant to 45 IAC 2.2-5-70(a).

Valves; Asset 21763.
Wastewater Treatments; Asset 21763.
Electrical Hookup; Asset 21763.
Tank; Asset 21763.
Grate; Asset 21764.
Noise Reducer; Asset 21832.
Waste Station Pit; Asset 21832.
Duskolector Installation; Asset 21832.
Bag House Upgrade; Asset 21695.
Ph Analyzer; page 54, purchase price \$470.00.

Any other items for which taxpayer sought the environmental quality exemption, but which are not specifically listed here, are denied the exemption.

FINDING

Taxpayer's protest is denied in part and sustained in part.

II. Safety Equipment – Sales/Use Tax.

Certain types of equipment, which constitute essential and integral parts of the integrated production process, are exempt. 45 IAC 2.2-5-8(c) "The fact that such equipment may not touch the work-in-progress or, by itself, cause a change in the product, is not determinative." 45 IAC 2.2-5-8(c)(2). "Safety clothing or equipment which is required to allow a worker to participate in the production process without injury or to prevent contamination of the product during production" is exempt. 45 IAC 2.2-5-8(c)(2)(F).

Taxpayer has met its burden of demonstrating that the following items should be exempted from sales tax pursuant to 45 IAC 2.2-5-8(c)(2)(F).

Gloves; page 41, purchase price \$87.50 and 79.80.
Safety Glasses; page 43, purchase price \$57.00, \$57.00, \$93.60, and \$162.50.
Gloves and Vinyl Aprons; page 44, purchase price \$7.38 and \$46.80.
Back Supports and Tyvek Gown; page 44, purchase prices \$42.70 and \$31.20.
Back Supports and Tyvek Aprons; page 49, purchase prices \$43.80 and \$95.95.
Gloves; page 61, price \$45.96.
Gloves; page 61, purchase price \$65.25.
Gloves; page 67, purchase price \$84.00.
Gloves, Aprons, Finger Guards; pages 67 and 68.
"Multiple Purchases" of Gloves, Aprons, Dust Masks, Ear Plugs, Tyvek Coveralls; pages 68, 69, and 70.

Taxpayer has not its burden of demonstrating that the following items are exempt from sales tax pursuant to 45 IAC 2.2-5-8(c)(2)(F).

Miscellaneous Safety Items; page 70, purchase price \$226.80, \$226.80, \$668.25.
Gloves, Aprons, Finger Guards; page 68, purchase prices \$806.00 and \$29.39.

FINDING

Taxpayer's protest is sustained in part and denied in part.

III. Production Equipment – Sales/Use Tax.

Transactions involving manufacturing machinery, tools, and equipment are exempt from the state Gross Retail Tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property. IC § 6-2.5-5-3(b).

Taxpayer has met its burden of demonstrating that the following items or transactions are exempt pursuant to IC § 6-2.5-5-3(b).

Press Automation; Asset 21237.
Quality Care Printers; Asset 21471.
Press Automation; Asset 21770.
Storage Tank; Asset 21853.
Dust Free Booth; Asset 21855, purchase price \$15,078; \$6,825; \$4,000; \$8,734; \$1,963; \$7,614; \$18,234; \$696.35; \$147.30; \$968.45; \$1,721.28; \$510.20; \$1,204.80; \$2,130.44; \$1,444; \$441; \$107; \$240; \$64.50.
Parts Holders; Asset 21861.
Workstations; Asset 21886.
Replacement Parts, page 49, purchase price \$12.00 and \$12.00.
Electrical Materials; Asset 21855, page 27, purchase price \$5,990.00.

Taxpayer has failed to meet its burden of demonstrating that the following items or transactions are exempt pursuant to IC § 6-2.5-5-3(b).

Tool Holders and Collet Chucks; Asset 21649.
Relocation Materials; Asset 21660.
Metal Guards; page 26, purchase price \$48,500.
Workstation; page 42, purchase price \$1,450.22.
Shoptowels; page 43.
Rawhide Mallets; page 43, purchase price \$83.88.
Bolts, Nuts, and Other Fasteners; page 43, purchase price \$425.04.
Lift Table; page 47, purchase price \$2,516.80.
Engraving Table Workstation; page 47, purchase price \$1,500.
Steel Table and Metals Stands; page 47, purchase price \$307 and \$403.
Diamond Compound; page 48, purchase price \$72.75 and \$79.50.
Test Solder; page 48, purchase price \$1,056.15 and \$1,045.05.
Machinery Lubricant; page 48.
Scoops; page 48, purchase price \$21.00, \$19.50, and \$7.42.
Repair Parts; page 49, purchase price \$29.75 and \$64.75.
Cutting Spindle; page 49, purchase price \$156.
BiLevel Workstation; page 49, purchase price \$249.95 and \$32.05.
T2 Ph Meter; page 50, purchase price \$439.00.
Roots Blower; page 53, purchase price \$4,423.00.
Ball Valve; page 53, purchase price \$330.00.
Replacement Electrical Parts; page 54, purchase price \$1,075.93.
Reversing Starter / Foot Switch; page 54, purchase price \$426.31 and \$112.07.
Worm Drive Hose Clamp / 20 Gallon Replacement Tank; page 54, purchase price \$58.75 and \$184.82.
Photo Switch and Timer; page 55, purchase price \$104.91 and \$188.18.
Roller Lubricator; page 56, purchase price \$269.00.
Prototype Castings; page 56, purchase prices \$125.00 and \$650.00.
Production Parts; page 56, purchase prices \$27.89, \$300.00, and \$312.00.
Plastic Wedges; page 56, purchase price \$1,288.
Tumbler Replacement Part; page 56, purchase price \$144.95.

Replacement Parts; page 56, purchase prices \$8.24 and \$190.69; page 57, purchase prices \$11.30 and \$138.89.
Hydraulic Hose Cylinders repair parts; page 57, purchase prices \$5.60, \$36.30, \$4.61, \$71.05, \$4.61, \$43.65, \$4.23, \$157.00, \$169.95, \$13.50, \$16.50, \$9.70 and \$140.50.
Boring Bar; page 57, purchase price \$158.00.
Equipment Replacement Parts; page 57, purchase price \$148.00.
Sand Screen; page 57, purchase price \$239.30.
Screw Machine Posts; page 57, purchase price \$600.00.
Replacement Parts; page 57, purchase price \$306.94.
Switch; page 58, purchase price \$91.27.
Ultrasonic Replacement Parts; page 61, purchase price \$83.00, \$600, \$8.40, \$278.64 and \$201.56.
Lathe Replacement Parts; page 61, purchase prices \$33.00 and \$21.50.
Tubing; page 61, purchase price \$183.08.
Ball Valve; page 61, purchase price \$193.92.
Cooling Coil; page 61, purchase price \$160.00.
Ultrasonic Water; page 61, purchase price \$890.00.
Compressor Parts; page 61, purchase price \$775.00.
Die Repair; page 61, purchase price \$130.00.
Finishing Equipment Repair Parts; page 67, purchase prices \$10.39, \$424.20, and \$135.45.
Pipe Cleaners; page 67, purchase prices \$316.00 and \$22.90.
Coolant; page 67, purchase price \$726.00.
Deburring Media; page 67, purchase price \$1,960.00.
Buffing Wheel Cleaner; page 68, purchase prices \$20.32, \$20.32, \$20.32, and \$250.00.
Buffing Wheel Abrasive Compound; page 68, purchase price \$255.00.

Any other items for which taxpayer sought the production equipment exemption, but which are not specifically listed here, are denied the exemption.

FINDING

Taxpayer's protest is denied in part and sustained in part.

IV. Adjustments – Sales/Use Tax.

“The notice of proposed adjustment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.” IC § 6-8.1-5-1(b)

Taxpayer seeks various adjustments to the proposed Sales and Use Tax assessments.

Taxpayer seeks an adjustment to Asset 21141, page 10, having a purchase price of \$1,664.25. Taxpayer has supplied information demonstrating that sales tax was included in the original purchase price.

Taxpayer seeks an adjustment to Asset 21199, page 11, purchases of \$90.08 and \$7,685.68 on the ground that sales tax was included in the original purchase price. Taxpayer has failed to provide information substantiating the argument.

Taxpayer argues that payments of \$1,516.66, \$3,059.86, \$3,092.54, listed on page 31, should be exempted because the payments represent items which were purchased for resale. Taxpayer has failed to substantiate this argument.

Taxpayer has asked that taxable purchases of software indicated on page 31, with purchase prices of \$7,318.00; \$7,318.00; \$7,318.00; \$7,318.00; \$7,318.00; \$7,318.00; \$7,318.00; \$7,318.00; \$7,318.00; \$7,318.00; and \$7,318.00; “be moved to the capital asset purchase assessment and not be projected in the expense projection.” Taxpayer failed to substantiate this argument.

Taxpayer argues that a payment of \$630.00, listed on page 38 represents labor for the preparation of a banner. Taxpayer has failed to substantiate this argument.

Taxpayer argues that a payment of \$104.00, listed on page 38, represents an item which was purchased for resale. Taxpayer failed to substantiate this argument.

Taxpayer argues that payments with a purchase price of \$472.80; \$383.66; \$472.80; \$797.28; \$472.80; \$972.18; \$945.60; \$797.28; \$797.28; \$383.66; \$797.28; \$383.66; \$972.19; and \$1,271.33, listed on page 39, represent items which were purchased for resale. Taxpayer has failed to substantiate this argument.

Taxpayer argues that a purchase of \$1,910.00, listed on page 54, should “be moved to the capital asset purchase assessment and not be project[ed] in [the] expense projection” on the ground that this was only a contract payment. Taxpayer failed to substantiate this argument.

Taxpayer argues that purchases from a certain tool supplier of \$218.40, \$126.55, \$352.00, and \$17.65, listed on page 56, should be adjusted to comport with the agreement that items purchased from this supplier be taxed at a lesser amount to account for the taxable portion of the tools which were used in plant maintenance. The Department finds that this adjustment is warranted. A similar adjustment for items listed on page 64 is also warranted.

Taxpayer argues that payments of \$4,458.60; \$1,324.14; \$1,158.60; \$1,316.23; \$60.00; \$1,158.60; \$2,600.85; \$772.42; \$675.85; \$35.00; \$767.80; \$675.85; \$371.55; \$11.35; \$96.54; \$5.00; \$109.68; and \$96.55, listed on page 58, should be exempted on the ground that the amounts represent the purchase of services only. Based on the sample invoice presented, taxpayer has failed to substantiate this argument.

FINDING

Taxpayer’s protest is sustained in part and denied in part.

V. Transporting Work-in-Process – Sales/Use Tax.

Equipment used to transport “work-in-process” within the production process is exempt. 45 IAC 2.2-5-8(f)(3). The regulation provides that, “Transportation equipment used to transport work-in-process or semi-finished materials to or from storage is not subject to tax if the transportation is within the production process.”

Taxpayer has failed to meet its burden of demonstrating that the following items are entitled to the exemption.

Conveyor Parts; Asset 21856, page 28.
Plastic Bags; page 43, purchase prices of \$64.00; \$8.16; \$1,890.20; and \$71.33.
Truck Leases; pages 45 and 46, purchase prices of \$779.68; \$36.49; \$292.68; \$602.82; \$488.80; \$697.30; \$585.38; \$645.34; \$253.91; \$669.59; \$845.92; \$679.13; \$644.27; \$611.56; \$63.63; \$292.56; \$656.76; \$331.73; \$216.25; \$122.25; \$122.50; and \$192.50.
Hinged Lid Containers; page 49, purchase price \$126.00.
Trays; pages 51 and 53, purchase prices of \$350.00; \$168.90; \$159.80; and \$168.90.
Truck; page 62, purchase price \$500.

FINDING

Taxpayer’s protest is respectfully denied.

VI. Lump-Sum Contracts – Sales/Use Tax.

Taxpayer protests the assessment of Use Tax on contracts it argues were made for improvements to real property. Taxpayer cites 45 IAC 2.2-3-9(e), in part:

With respect to construction material a contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax (measured on the purchase price) to the Department of Revenue when he disposes of such property in the following manner . . . (3) Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.

Taxpayer has met its burden of demonstrating that the following represent lump sum contracts for which no use tax is due.

Decontamination Contract; Asset 21660, page 14.
Building Addition; page 46, purchase price \$2,200.
Miscellaneous Electrical Work; page 48, purchase prices \$401.68, \$640.00, \$3,480.00, and \$3,530.99.

FINDING

Taxpayer’s protest is sustained.

VII. Temporary Storage Exemption – Sales/Use Tax.

Taxpayer bought promotional materials such as posters, catalogs, and clothing items and then stored those materials briefly at one of taxpayer's Indiana locations. The materials were sent to retail outlets and other locations found both within Indiana and out-of-state.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state Gross Retail Tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-2-1.

A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

The complementary use tax is not imposed on the keeping, retaining, or exercising of any right or power over tangible personal property, if: (1) the property is delivered into Indiana by or for the purchaser of the property; (2) the property is delivered in Indiana for the sole purpose of being processed, printed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property; and (3) the property is subsequently transported out of state for use solely outside Indiana. IC § 6-2.5-3-2(e) *See also* 45 IAC 2.2-3-20.

According to IC § 6-2.5-3-4, “the storage, use, and consumption of tangible personal property is exempt from use tax if: 1) the property was acquired in a retail transaction in Indiana and the sales tax had been paid; or 2) the property was acquired in a transaction that is exempt from sales tax under any part of IC § 6-2.5-5, except IC § 6-2.5-5-24(b), and the property is being used, stored, or consumed for the purpose for which it was exempted.”

Taxpayer *was* allowed the temporary storage exemption on items purchased from *out-of-state* vendors, shipped or delivered to taxpayer's Indiana distribution center, and thereafter sent to out-of-state dealers.

Taxpayer *was* assessed tax on taxable purchases from *Indiana* vendors which were shipped or delivered to the Indiana distribution center then later sent to out-of-state locations. Taxpayer predicates its protest on IC § 6-2.5-3-2(a), (e) arguing that its temporary storage of personal property in Indiana did not give rise to a taxable exercise of ownership because taxpayer's personal property – bought from Indiana vendors – was temporarily retained in Indiana for subsequent use outside of Indiana. As a result, taxpayer argues, the items did not meet the definition of taxable storage under IC § 6-2.5-3-1 or IC § 6-2.5-3-2 but were exempt under the definition of storage as discussed by the Indiana Tax Court in Miles v. Indiana Dept. of State Rev., 659 N.E.2d 1158 (Ind. Tax Ct. 1995).

Metaphorically speaking, taxpayer is barking up the wrong tree. The items taxpayer purchased from the Indiana vendors were subject to sales tax; taxpayer failed to pay that tax and the omission was corrected at the time of the audit by assessing use tax. The exemption sought is applicable to items bought from out-of-state vendors, temporarily stored in Indiana, and then shipped to out-of-state locations. IC § 6-2.5-3-2(e) is inapplicable under these circumstances.

Taxpayer fails to meet its “burden of demonstrating entitlement to the exemption.” Indianapolis Fruit Co. v. Dept. of State Rev., 691 N.E.2d 1379, 1383 (Ind. Tax Ct. 1998). The use tax assessments – functioning in this case as a complement to the unpaid sales tax – paid to an Indiana registered Indiana vendor may only be refunded if the transaction is exempt under any one of the sections of IC § 6-2.5. The temporary storage exception found within IC § 6-2.5-3-2(e) is specifically and exclusively applicable to “[a]n excise tax, known as the use tax.” IC § 6-2.5-3-2.

As stated in the Department’s “Application for Direct Pay Authorization,” “Direct pay authorization may not be used for . . . property purchased in Indiana for storage in Indiana and subsequent use outside Indiana as provided by the exception contained in IC §§ 6-2.5-3-1 and 2.”

Taxpayer’s argument fails because there is no “temporary storage tax exception” for sales tax. Taxpayer purchased taxable items from Indiana vendors, should have paid sales tax at the time of the original transaction, and use tax was subsequently assessed to correct taxpayer’s failure to pay the sales tax.

FINDING

Taxpayer’s protest is respectfully denied.

VIII. Music Collections Sold to Dealers – Sales/Use Tax.

Taxpayer bought music folios – collections of printed music – from an outside vendor. Another vendor printed taxpayer’s own brand name on the folios before the taxpayer sold the music collections. Taxpayer argues that the printing costs are not subject to tax.

The music folios are exempt from sales tax pursuant to IC § 6-2.5-5-8 because the folios were purchased for eventual resale.

The printing costs are exempt because the printing was a service not “tangible personal property.” *See* IC § 6-2.5-3-2(a); 45 IAC 2.2-4-2.

FINDING

Taxpayer’s protest is sustained.

IX. Gift Items Purchased from Out-of-State Vendors – Sales/Use Tax.

Taxpayer bought gift items for \$257.00 and \$702.00 from out-of-state vendors. The items were shipped from the vendors’ location to out-of-state recipients. Taxpayer maintains that these items were not subject to Sales or Use Tax. Taxpayer is correct. Items purchased out-of-state and delivered directly to another out-of-state location are not subject to Indiana’s Sales or Use Tax. *See* 45 IAC 2.2-3-4; 45 IAC 2.2-1-1(c).

FINDING

Taxpayer's protest is sustained.

X. Labels and Packaging Materials – Sales/Use Tax.

Taxpayer argues that certain of its packaging labels are entitled to exempt status under 45 IAC 2.2-5-15 and 45 IAC 2.2-5-16. Departmental regulation states that, "The state Gross Retail Tax shall not apply to sales of nonreturnable wrapping materials and empty containers to be used by the purchaser as enclosures or containers for selling contents to be added, and returnable containers containing contents sold in a sale constituting selling at retail and returnable containers sold empty for refilling." 45 IAC 2.2-5-16(a)

Taxpayer argues that Headlock Stickers – attached to drum cartons and describing the products inside – are exempt. Taxpayer errs. The stickers are neither "enclosures or containers for selling contents" Id.

Taxpayer argues that "use and care sheets" packed with its musical instruments are exempt. Taxpayer errs. The "use and care sheets" are neither "enclosures nor containers for selling contents" Id.

FINDING

Taxpayer's protest is respectfully denied.

XI. Testing and Inspection Equipment – Sales/Use Tax.

The Indiana Administrative Code provides an exemption for equipment used in testing and inspection. 45 IAC 2.2-5-9(i). The Regulation states that "[m]achinery, tools, and equipment used to test and inspect the product as part of the production process are exempt."

Taxpayer made two purchases – consisting of payments of \$226.32 and \$1,214.08 – for "a quality control testing . . . workbench including drawers." Taxpayer has met its burden of demonstrating that this particular item is entitled to the "testing and inspection" exemption.

Taxpayer made three purchases – consisting of payments of \$95.85, \$59.50 and \$32.50 – which taxpayer states were for "equipment for quality control and used in testing the product for specifications and tolerances." Taxpayer has failed to meet its burden of demonstrating that these items are entitled to the "testing and inspection" exemption.

Taxpayer purchased a "superwide polyethylene bottle . . . used in the quality control lab as equipment for testing of the product" The purchase price was \$10.34. Taxpayer has failed to meet its burden of demonstrating that this bottle is entitled to the "testing and inspection" exemption.

Taxpayer made two purchases for \$40.00 and \$159.00. Taxpayer states these payments were for “quality control testing equipment in the production of [taxpayer’s product]. Taxpayer has failed to meet its burden of demonstrating that these items are entitled to the “testing and inspection” exemption.

FINDING

Taxpayer’s protest is sustained in part and denied in part.

XII. Catalog Information – Sales/Use Tax.

Taxpayer paid a company to design images and provide those images by means of a compact disc. Taxpayer maintains that the cost of the purchases - \$55.00 and \$35.00 – is not subject to sales tax because the cost of the disc represents less than ten percent of the cost.

Taxpayer points to 45 IAC 2.2-4-2(a) which states as follows:

Professional services, personal services, and services in respect to property not owned by the person rendering such services are not “transactions of a retail merchant constituting selling at retail”, and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless . . . (3) the price charged for tangible personal property is inconsequential (not to exceed 10 [percent]) compared with the service charge”

Taxpayer maintains that the \$55.00 and \$35.00 represent primarily the cost of designing the images contained on the compact disc and that the cost of the actual discs is “inconsequential.” However, there is nothing to indicate what the company charged to design the images and that this indeterminate design cost is in any way severable from the price paid by the taxpayer. There is insufficient information to determine with any certainty that the \$55.00 and \$35.00 represents the cost paid for the design services.

Similarly, taxpayer challenges the Sales and Use Tax assessment against three costs items of \$1,625.00, \$156.88, and \$9,164.83. Taxpayer maintains that the costs are for the labor involved in copying taxpayer’s catalog to compact discs. As such, taxpayer maintains that the charges are not subject to Sales or Use Tax. The three costs represent what taxpayer spent to order tens-of-thousands of its catalogs in compact disc format. Taxpayer has provided insufficient information to determine that the three specific costs were for labor.

FINDING

Taxpayer’s protest is respectfully denied.

XIII. Supermarket Purchases – Sales/Use Tax.

The audit review assessed Use Tax on two purchases made from a supermarket. Taxpayer was unable to provide invoices that distinguished exempt food items from non-exempt items. Consequently, the audit assessed tax against the full amount of each purchase. Taxpayer states that, “it is impossible to purchase food for human consumption without paying sales tax on the taxable items such as paper plates, plastic silverware etc. [because] these items are programmed into the cash register for automatic application of the tax.” Taxpayer concludes that “these purchases should be removed from the audit assessment since tax was paid to the vendor.”

“The gross retail tax act exempts food for human consumption.” 45 IAC 2.2-5-38

As noted above, IC § 6-8.1-5-1(b) states that, “The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.”

The substantive evidence provided by taxpayer is non-existent and taxpayer is reminded that, in order to justify the exemption, taxpayer should have maintained appropriate records. However, given the nature of the two transactions, it is not entirely unreasonable to assume that the supermarket charged the appropriate tax at the time the transaction was complete.

FINDING

Taxpayer’s protest is sustained.

XIV. Magazine Subscription/Dues – Sales/Use Tax.

Taxpayer made three purchases of \$75.00, \$85.00, and \$105.00 for which the audit assessed Use Tax. On the audit report these purchases are described as “Membership Dues – Subscription portion,” “Membership Dues – MFG Eng Magazine,” and “Dues/Subscription.” Taxpayer maintains that the three costs represent non-taxable membership dues. In contrast, the audit report indicates that “These taxable purchases are for subscriptions and publications delivered to an Indiana location.”

“In general sales of all publications irrespective of format are taxable. The exemption provided by this rule . . . is limited to newspapers.” 45 IAC 2.2-5-26(a)

Taxpayer asks that the Department second-guess the audit and overturn its decision that the three costs are not for magazine subscriptions but strictly membership dues. The three costs may indeed include some form of membership dues; however, on the face of the information provided, it is not possible to conclude that the purchases were anything other than the purchase of magazine subscriptions.

FINDING

Taxpayer's protest is respectfully denied.

XV. Ten-Percent Negligence Penalty.

Taxpayer argues that imposition of the ten-percent negligence penalty is inappropriate and that the Department should exercise its authority to abate the penalty. Taxpayer states that it "historically remitted use tax in cases where the vendor failed to bill the sales tax [and] also has a system in place to track and accrue use tax on both instate and out of state expense purchases."

IC § 6-8.1-10-2.1(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence.

Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case by case basis according to the facts and circumstances of each taxpayer." *Id.*

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed"

During the period under audit, the taxpayer self-reported approximately \$32,000 in use tax. The audit found that taxpayer owed additional use tax of approximately \$273,000. While a portion of taxpayer's protest has been sustained, the obvious extent of the initial discrepancy is not indicative of the "reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." 45 IAC 15-11-2(b).

FINDING

Taxpayer's protest is respectfully denied.